



The State of New Hampshire
Department of Environmental Services



Michael P. Nolin
Commissioner

Carnoustie Center LLC
300 West Vine Street, Suite 1100
Lexington, Kentucky 40507

Konover Construction Corporation
PO Box 4052
Farmington, CT 06032

Alvin J. Coleman & Son, Inc.
9 NH Route 113
Conway, New Hampshire 03818

Re: Konover Development, Tilton,
Site Specific Permit # WPS-7083
Wetlands Permits # 2004-01981
Violations of RSA 485-A and RSA 482-A

ADMINISTRATIVE ORDER
No. WD 06-022

May 2, 2006

A. INTRODUCTION

This Administrative Order is issued by the Department of Environmental Services, Water Division, jointly and severally to Carnoustie Center LLC, Konover Construction Corp., and Alvin J. Coleman & Son, Inc., pursuant to RSA 485-A:22 and RSA 482-A:6. This Administrative Order is effective immediately upon issuance.

B. PARTIES

1. The Department of Environmental Services, Water Division ("DES"), is a duly constituted administrative agency of the State of New Hampshire, having its principal offices at 29 Hazen Drive, Concord, New Hampshire.
2. Carnoustie Center LLC is a New Hampshire limited liability company having a mailing address of 300 West Vine Street, Suite 1100, Lexington, KY 40507.
3. Konover Construction Corp. is a corporation registered to do business in New Hampshire having a mailing address of P.O. Box 4054, Farmington, CT 06034-4054.
4. Alvin J. Coleman & Son, Inc. is a New Hampshire corporation having a mailing address of 9 NH Route 113, Conway, NH 03818.
5. Carnoustie Center LLC ("Carnoustie"), Konover Construction Corp. ("Konover"), and Alvin J. Coleman & Son, Inc. ("Coleman"), are hereinafter collectively referred to as "the Responsible Parties."

C. STATEMENT OF FACTS AND LAW

1. Pursuant to RSA 485-A:17, DES regulates significant alteration of terrain and erosion control through a permit program. Pursuant to RSA 485-A:6, VIII, DES has adopted NH Administrative Rules Env-Ws 415 to implement this program.
2. RSA 482-A authorizes DES to regulate dredging, filling, and construction in or on any bank, flat, marsh, wetland, or swamp in and adjacent to any waters of the state. Pursuant to RSA 482-A:11, I, the Commissioner of DES has adopted Wt 100 *et seq.* to implement this program.
3. RSA 482-A:3, I states that "[no] person shall excavate, remove, fill, dredge or construct any structures in or on any bank, flat, marsh, or swamp in and adjacent to any waters of the state without a permit from [DES]."
4. RSA 482-A:14, III, provides that "(f)ailure, neglect or refusal to comply with [RSA 482-A] or rules adopted under [that] chapter, or an order or condition of a permit issued under [RSA 482-A], and the misrepresentation by any person of a material fact made in connection with any activities regulated or prohibited by [RSA 482-A] shall be deemed violations of RSA 482-A".
5. Env-Ws 415.02(y) defines significantly altering the characteristics of the terrain to include disturbing more than 100,000 square feet of contiguous area.
6. RSA 485-A:17 requires any person who proposes to significantly alter the terrain to obtain a permit from DES prior to initiating the work.
7. Env-Ws 415.09(i) and (k) require employment of temporary and permanent methods for preventing soil erosion and controlling runoff.
8. Env-Ws 415.09(j) requires construction phasing and sequencing, including methods for limiting the length of time of exposure of unstabilized soils.
9. Carnoustie is the owner of property located in Tilton, New Hampshire, more particularly identified on Town of Tilton Tax Map 4-4 as Lot 36, and Tax Map 24 as Lots 1,2, 2B and 2C ("the Property").
10. Konover is the general contractor and Coleman is the subcontractor for the large retail development project on the Property.
11. On March 15, 2005, DES issued Alteration of Terrain/Site Specific Permit # WPS-7083 to Carnoustie to construct a large retail development on the Property. On the approved Plans, the Property was identified as 5 parcels ("A" through "E").
12. Condition #1 of the permit stated that "[W]ater quality degradation shall not occur as a result of the project. Appropriate erosion control measures shall be undertaken during all approved phases of construction to contain and prevent migration of sediments."

13. Condition # 4 of the permit provided that the approved plans and supporting documentation ("the Plans") in the project file are part of the Alteration of Terrain/Site Specific permit. The Plans detail the sequence of construction, and the measures to be taken in sediment and erosion control. Relevant provisions of the Plans include:

- a) Item #5 in the Construction Sequence (Sheet 21 of the Plans dated 12/20/04, Rev. 4) states: "[d]etention basins and treatment swales. Place headwalls, rip-rap and other drainage facilities according to the plan. The site contractor shall stabilize all ditches, swales, and ponds/basins and structures prior to directing flow to them. Stabilization shall be to establish a healthy stand of grass, sod or rip-rap as shown on plans."
- b) Item # 6 in the Construction Sequence (Sheet 21 of the Plans dated 12/20/04, Rev. 4) states: "Rough grade site or phased work area."
- c) Item # 4 in the Construction Sequence (Sheet 29A of the Plans dated 12/20/04, Rev. 4)) requires construction of "drainage system at the downstream discharge point. Construct the rip rap level spreader and grass swale. Stabilize area with loam and seed."
- d) Item # 5 in the Construction Sequence (Sheet 29A) requires rough grading of the detention basins.
- e) Item# 6 in the Construction Sequence (Sheet 29A of the Plans dated 12/20/04, Rev. 4) requires installation of silt fence between basin areas.
- f) Item # 7 in the Construction Sequence (Sheet 29A of the Plans dated 12/20/04, Rev. 4) requires construction of "collector drain lines and outlet structures."
- g) Item # 8 in the Construction Sequence (Sheet 29A of the Plans dated 12/20/04, Rev. 4) required the Responsible Parties to "finish grade detention basin 5, construct emergency spillway and rip rap swale downstream of spillway, stabilize detention basin with 4" loam and seed and erosion control matting."
- h) Item # 9 in the Construction Sequence (Sheet 29A of the Plans dated 12/20/04, Rev. 4) required the Responsible Parties to "finish grade detention basin 4, construct emergency spillway and rip rap swale downstream of spillway, stabilize detention basin with 4" loam and seed and erosion control matting."
- i) Item # 10 in the Construction Sequence (Sheet 29A of the Plans dated 12/20/04, Rev. 4) required the Responsible Parties to "finish grade detention basin 3, construct emergency spillway and rip rap swale downstream of spillway, stabilize detention basin with 4" loam and seed and erosion control matting."
- j) Item # 11 in the Construction Sequence (Sheet 29A of the Plans dated 12/20/04, Rev. 4) required the Responsible Parties to "finish grade detention basin 1, construct emergency spillway and rip rap swale downstream of spillway, stabilize detention basin with 4" loam and seed and erosion control matting."
- k) Item # 12 in the Construction Sequence (Sheet 29A of the Plans dated 12/20/04, Rev. 4) required the Responsible Parties to "finish grade detention basin 2, construct emergency

spillway and rip rap swale downstream of spillway, stabilize detention basin with 4" loam and seed and erosion control matting."

14. May 27, 2005 DES personnel met with Chris Rice of T.F. Moran, Inc., Dusty McMahan of Konover Development, Robert Hedden of Konover Development, Michael Tighe of Konover Construction, Peter Walker of Vanasse Hangen Brustlin, Inc., and Mark Kupiec of Konover Construction, for a preconstruction meeting at the Tilton Town Hall. All parties present signed the "Pre-Construction Meeting Memo" sheet. Relevant points that were discussed at the meeting were:

- a) No more than 5 acres were to be open/unstabilized at any given time;
- b) Ponds, treatment swales, filter strips shall be stabilized with 85 % vegetative cover prior to directing runoff to them, and prior to construction of building pads and parking lots;
- c) All slopes are to be stabilized immediately upon completion;
- d) Erosion control measures will be maintained throughout the duration of construction;
- e) Soil stockpiles will be seeded;
- f) Open/unstable areas are to be reduced to 3 acres by October 15, in preparation of the winter construction season; and,
- g) Dewatering will take place in upland areas.

15. On June 10, 2005, DES personnel approved modification of the 5-acre maximum allowable open area, as follows:

- a) The open area would not include the area of the building pad "so long as the operator of the site can control the storm water leaving the area by use of appropriate Best Management Practices ("BMPs") and providing treatment/filtration prior to discharge into existing channels."
- b) "The surface of sub-grade, sub-base or base that is adequately compacted to its final compaction would be considered temporarily stabilized (before the bituminous pavement is laid) so long as standby measures are available to control and filter any storm water that bleeds from failed areas. This is applicable for the roadway or parking lot construction. If they are stabilized as described herein, then the area can be removed from the 5-acre count."

16. On March 4, 2005, DES issued Wetlands Permit # 2004-01981 ("the Wetlands Permit") to Carnoustie Centre, LLC to "dredge and fill 2.7 acres of palustrine forested wetland for access and lot development.

17. On October 6, 2005, DES personnel conducted a site inspection of the Property in response to complaints of turbidity in the Winnepesaukee River as a result of erosion and

sedimentation from the Property. Runoff was being directed to upper ponds that had not been stabilized; the small basin on Grant Street and Route 3 did not have sufficient capacity to handle flows from the entire open area. At the time of the inspection, work was ongoing to install adequate erosion control measures to control unstable soils and in preparation of an expected rain event.

18. On October 7, 2005, DES personnel conducted a follow-up inspection of the Property. The basin at the Grant Street intersection had been enlarged, and additional erosion control measures had been installed at that location. A series of check dams had been constructed leading to that basin. The wetland area directly behind the Grant Street basin had been ringed with silt fence and haybales.

19. On October 8, 2005, sediment-laden runoff from the Property entered the Winnepesaukee River. DES personnel collected water samples at several locations along the River and the samples were analyzed for turbidity. Turbidity results were greater than 1000 Nephelometric Turbidity Units (NTUs) at the point where runoff from the Property entered the Winnepesaukee River, and greater than 1000 NTUs approximately 5 feet downstream of the discharge point. The background turbidity level taken upstream of the discharge point measured 1.36 NTU's.

20. On October 12, 2005, DES personnel conducted an inspection of the Property. The rain event of October 7 - 9, 2005 registered 8.48 inches of rain at Laconia Airport, the nearest weather monitor. All the detention basins on Parcels B and C were filled to capacity. The side slopes of one basin had breached at the outlet structure. Another basin had been intentionally breached to prevent further damage to the walls of the pond. Sediment-laden runoff from the Lowes basins on Parcel B and C had overwhelmed all the check dams, and the detention basin and erosion control measures at Grant Street. Route 3 had been closed for a time because of road flooding. Contractors were working to re-establish erosion control measures.

21. On October 19, 2005, DES personnel conducted an inspection of the Property with Mark Kupiec of Konover, Chris Rice of T.F. Moran, and Tim Bryant of VHB (consulting engineers for the Responsible Parties). The Property was not stabilized and erosion problems were evident throughout. DES requested a plan for immediate stabilization in preparation for the approaching winter season, and a schedule for completion of the stabilization work.

22. On October 24, 2005, DES personnel met on site with the Responsible Parties and/or their representatives, Merrill Construction (working on the Grant Street project), and the consulting engineers. The Responsible Parties presented a plan for stabilization of the Property, with an implementation schedule, to DES.

23. On October 28, 2005, DES personnel conducted a follow-up inspection of the Property. Detention basins # 3 and 4 were being temporarily stabilized with erosion control matting and stone on the basin floor. Accumulated sediment had been removed from the level spreader and swale leading to it. Construction of detention basin #5 had not started. DES recommended that a temporary detention basin be constructed between the end of the level spreader and the Grant Street basin.

24. On November 4, 2005, DES personnel met with the Responsible Parties and/or their

representatives on the Property. Progress had been made on the stabilization plan. Temporary stabilization work on detention basins # 3 and 4 was complete. Stabilization work had been started on detention basins # 1 and 2. Runoff entering the swale and level spreader on Parcel C was clear. DES recommended that the temporary detention basin between the level spreader and the Grant St. basin be made permanent.

25. On November 10, 2005, DES personnel conducted an inspection of the Property. No additional stabilization work had been completed since the November 4, 2005 inspection. The Lowes building was nearly complete.

26. On November 18, 2005, DES personnel conducted an inspection of the Property. Temporary stabilization of detention basin #1 was complete. Construction of detention basin #5 had been started, however, runoff had been directed to it, and the unstabilized outlet structure was overwhelmed. Sediment-laden runoff from basin #5 entered jurisdictional wetlands and the Grant Street basin. Areas between the detention basins were exposed with no erosion control measures in place. Paving of the parking lot was on-going. DES recommended enlarging the detention basin between the level spreader and the Grant Street basin.

27. On December 1, 2005, DES personnel conducted an inspection of the Property with EPA personnel, and the Responsible Parties and/or their representatives. Detention basin #5 was not stabilized. Exposed areas between ponds had not been addressed. The parking lot paving was complete.

28. On December 9, 2005, DES personnel conducted an inspection of the Property. There was snow on the ground. Temporary stabilization work appeared to be complete.

29. On February 9, 2006, DES personnel conducted a follow-up inspection of the Property. Exposed soils were visible between the detention basins. The future Kohl's site was completely exposed. Erosion was evident. Runoff was being directed to a low point on the Property (up slope of wetlands) and a large amount of sediment had accumulated at the silt fence.

30. On April 6, 2006, DES personnel conducted an inspection of the Property. There were still areas of exposed soils on the Property. Rilling and gullying was evident under the erosion control blankets that had been installed on the side slopes of the detention basins. There were accumulations of sand and trash around some catch basins. The swale leading to the level spreader was filled with sediment. Slopes on the eastern side of the swale were eroding and adding to the sediment in the swale. Many of the erosion control blankets on the Property were furled at the edges or ends. The side slopes of detention basin #5 were sloughing. Site work had started on the building on Parcel A. DES personnel notified the Responsible Parties of the problems at the site.

31. On April 14, 2006, DES personnel conducted a follow-up inspection of the Property. No stabilization work had been done since the last inspection. The drainage structures on Parcel A had not been constructed. The building on Parcel A had been started.

32. DES personnel observed that surface water runoff from the Property had entered into the Winnepesaukee River, a surface water of the state.

33. Pursuant to RSA 485-A:8, II, the Winnepesaukee River is classified as a Class B water.

34. Pursuant to Env-Ws 1703.11(b), turbidity in Class B waters shall not exceed naturally occurring conditions by more than 10 NTUs.

35. RSA 485-A:13 states that it shall be unlawful for any person or persons to discharge or dispose of any sewage or waste to a surface water or the groundwater of the state without first obtaining a permit from DES. Sediment-laden water constitutes waste as defined under RSA 485-A.

D. DETERMINATION OF VIOLATIONS

1. The Responsible Parties have violated RSA 485-A:17 and Env-Ws 415.09(i) by failing to install adequate erosion control measures on the Property in accordance with the approved plans.
2. The Responsible Parties have violated RSA 485-A:17, Env-Ws 415.09(k) and Env-Ws 415.13(b) by failing to implement adequate temporary and permanent methods for controlling runoff at the Property in accordance with the approved plans.
3. The Responsible Parties have violated RSA 485-A:17 by failing to follow the approved construction sequence.
4. The Responsible Parties have violated RSA 485-A:17, Env-Ws 415.09(j) and Env-Ws 415.13(b) by failing to stabilize areas within the Property as per the approved plan.
5. The Responsible Parties have violated RSA 485-A:13, I, by discharging waste into a surface water of the state without obtaining a permit from DES.
6. The Responsible Parties have violated RSA 482-A:3, I, by placing fill in wetlands and surface waters of the State without a permit from DES.
7. The Responsible Parties have violated RSA 482-A, by not following the erosion control methods outlined in Best Management Practices during construction operations on the Property (Condition #19 of the Wetlands Permit).

E. ORDER

Based on the above findings, DES hereby orders the Responsible Parties as follows:

1. **Immediately cease and desist** all activities on the Property, except as necessary to stabilize the Property pursuant to this Order.
2. **Immediately stabilize the Property** as necessary to protect surface water quality and prevent erosion. At a minimum, the following activities shall be completed **within 7 days** of the date of this Administrative Order:
 - a) Loam, seed, and mulch all unstabilized/unvegetated (or sparsely vegetated) areas;

install erosion control matting on all slopes steeper than 3:1.

b) Remove accumulated sediment from all swales;

c) Reconstruct vegetated swale leading to level spreader on Parcel C;

3. **Within 15 days of the date of this order**, construct and stabilize drainage structures on Parcel A.

4. Continue monitoring of the Property by a Professional Engineer or a Certified Professional in Erosion and Sediment Control ("the monitor") to monitor construction of drainage structures and implementation of stabilization measures on the Property. The monitor shall, at a minimum:

a) Perform inspections once every 7 days and within 24 hours of a 0.5 inch rain event, or greater (i.e., 0.5 inch or more of precipitation within a 24 hour period).

b) Provide technical assistance and recommendations to the contractor performing the work on the Property.

c) Provide DES with monitoring reports **within 24 hours** of each inspection. The monitoring reports shall:

i) Include the status of the corrective action for each violation in section D of this Order, and the timetable for completion of the item;

ii) Include a description of additional erosion, sedimentation, stabilization, drainage and runoff deficiencies observed during the inspection;

iii) Include a list of proposed recommendations to correct additional deficiencies observed during the inspection, and the timetable for completion of these items, and; and,

iv) Be submitted to DES via e-mail to aherrero@des.state.nh.us.

5. **Within 45 days of the date of this Order**, the Responsible Parties shall submit photographic evidence that demonstrates that all unstabilized areas of the Property have been permanently stabilized with 85% vegetative cover or other means as identified on the approved Plans.

F. APPEAL

Any person aggrieved by the determinations D.1 through D.5 of this Order may appeal to the New Hampshire Water Council by filing an appeal that meets the requirements specified in Env-WC 200 within 30 days of the date of this Order. Copies of the rule are available from the DES Public Information Center at (603) 271-2975 or at <http://www.des.state.nh.us/desadmin.htm>.

Any person aggrieved by determinations D.6 and D.7 of this Order may request that DES reconsider this determination within 20 days of the date of the Order. The request for


reconsideration must comply with Wt 203.01(d) (copy attached), and will be processed in accordance with Wt 203.01(e)-(j). Any party not satisfied with the decision on reconsideration may appeal to the Wetlands Council. Please note that under RSA 482-A:10, II, the Council may not consider any ground that is not set forth in the request for reconsideration.

Filing an appeal or request for reconsideration of the Order will not automatically relieve the Responsible Parties of their obligation to comply with the Order.

G. OTHER PROVISIONS

Please note that RSA 485-A:22 and RSA 482-A:13 and 482-A:14 provides for administrative fines, civil penalties, and criminal penalties for the violations noted in this Order, as well as for failing to comply with the Order itself. The Responsible Parties remain obligated to comply with all applicable requirements. DES will continue to monitor the Responsible Parties' compliance with applicable requirements and will take appropriate action if additional violations are discovered.

This Order is being recorded in the Belknap County Registry of Deeds so as to run with the land.


Harry T. Stewart, P.E., Director
Water Division


Michael P. Nolin, Commissioner
Department of Environmental Services

Hand Delivered

cc: Gretchen R. Hamel, Legal Unit Administrator
Belknap County Registry of Deeds
Tilton Planning Board
Tilton Conservation Commission
C T Corporation System
Lawyers Incorporating Service
Caroline D. Coleman

cc: James P. Martin, Public Information Officer, DES
Jennifer J. Patterson, Sr. Asst. Attorney General, NHDOJ/EPB
Peter F. Kudarauskas, U.S. EPA, Region I
Tracey Boisvert, Senior Enforcement Officer, DES Wetlands
Jocelyn Degler, Wetlands Permitting Officer, DES